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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

DAVID COOK,

Plaintiff,

v.

COUNTY OF CONTRA COSTA; Contra Costa County Sheriff DAVID O. LIVINGSTON; Contra Costa County Assistant Sheriff MATTHEW SCHULER; West County Detention Facility Commander LT. CRAIG BROOKS; West County Detention Facility Nursing Director ELENA O'MARY; Chief Medical Officer of Contra Costa Regional Medical Center and West County Detention Facility Medical Director DAVID GOLDSTEIN, and DOES I to XX, inclusive,

Defendants.

No. C15-05099 TEH

DEFENDANTS DAVID O. LIVINGSTON, MATTHEW SCHULER, LT. CRAIG BROOKS, ELENA O'MARY, AND DAVID GOLDSTEIN'S NOTICE OF MOTION AND MOTION TO DISMISS ALL CLAIMS IN PLAINTIFF'S THIRD AMENDED COMPLAINT AGAINST THEM; MEMORANDUM OF POINTS AND AUTHORITIES

[Fed. R. Civ. P. 12(b)(6)]

Date: December 5, 2016
Time: 10:00 a.m.
Crtrm: 2, 17th Floor
Judge: Hon. Thelton E. Henderson, Presiding

Date Action Filed: May 5, 2015
Trial Date: None Assigned

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NOTICE OF MOTION AND MOTION

TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Monday, December 5, 2016, at 10:00 a.m., or as soon thereafter as the matter may be heard in the above-entitled court, located at 450 Golden Gate Avenue, San Francisco, California, Defendants DAVID O. LIVINGSTON, MATTHEW SCHULER, LT. CRAIG BROOKS, ELENA O'MARY, and DAVID GOLDSTEIN[1] will and hereby do move this Court for an order under Federal Rule of Civil Procedure 12(b)(6) dismissing all claims for relief asserted against them in the Third Amended Complaint because they fail to allege sufficient facts to state a claim for relief.

This motion is supported by this notice, the memorandum of points and authorities, all the papers and records on file in this action, and such other materials as may be submitted at or before the hearing on the motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff David Cook's ("Plaintiff") Third Amended Complaint ("TAC") asserts state and federal causes of action against Defendants Sheriff David O. Livingston, Assistant Sheriff Matthew Schuler, Lt. Craig Brooks, Nursing Director Elena O'Mary, and Chief Medical Officer David Goldstein (collectively "Defendants"), arising out of a slip-and-fall accident on September 26, 2014, at the West County Detention Facility ("WCDF"). Specifically, Plaintiff brings a Section 1983 claim for deliberate indifference to his medical needs under the Eighth Amendment, a Section 1983 claim for supervisory liability, and state law causes of action for failure to summon medical care and medical malpractice.

Plaintiff's TAC still falls short of stating any plausible claim against the individual defendants, just as it failed against the County of Contra Costa ("County"). The Section 1983 claims fail because Plaintiff fails to allege any facts to show personal participation by any of

[1] This Court dismissed Defendant County of Contra Costa from the action, with prejudice, on June 21, 2016. *See* ECF Doc. No. 38.

the individual defendants in any alleged constitutional violation. Moreover, the TAC fails to allege sufficient facts to state any deliberate indifference claim. The state law claims fail because, as this Court already ruled, they are barred by the California Tort Claims Act.[2]

Plaintiff has now failed in four attempts to state any plausible claim against the County defendants. Accordingly, the individual defendants respectfully request that the Court dismiss all causes of action against them with prejudice, and without further leave to amend.

II. ISSUES TO BE DECIDED

1. Does the first claim for relief under 42 U.S.C. § 1983 against Defendants, for deliberate indifference to medical needs under the Eighth Amendment, fail to allege facts to establish any personal participation by the named defendants in the alleged constitutional violation?

2. Does the first claim for relief under 42 U.S.C. § 1983 against Defendants, fail to allege facts to establish a deliberate indifference to medical needs claim under the Eighth Amendment?

3. Does Plaintiff's fourth claim for relief under 42 U.S.C. § 1983 fail to allege sufficient facts to properly state a supervisory claim against any Defendant?

4. Must the first, second, third and fourth claims for relief under 42 U.S.C. § 1983 against Defendants in their official capacities be dismissed?

5. Are the fifth and sixth claims for relief against Defendants barred under California law because, as this Court already ruled, Plaintiff did not allege any facts in his government tort claim relating to a (1) failure to summon medical care claim, or (2) medical malpractice claim?

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[2] This Court dismissed the same state law claims against the County, with prejudice, in its Order granting the motion to dismiss the second amended complaint ("SAC"). *See* ECF Doc. No. 24 at 5:1-6:28. But Plaintiff included those identical state law claims again in the TAC, asserted against only the individual defendants, and not the County. As set forth in Section V.D. of this brief, *infra*, the state law claims in the TAC against the individual defendants are barred for the same reasons as they were barred against the County in the SAC. Namely, Plaintiff's government tort claim did not include any factual allegations to put the County or its employees on notice of any failure to summon medical care or medical malpractice causes of action.

6. Does the fifth claim for relief against Defendants fail under California law because under the facts alleged, the Defendants are immune from liability for any alleged failure to summon medical care?

7. Does the sixth claim for relief against Defendants fail under California law because Plaintiff fails to plead requisite procedural facts to state a medical malpractice claim?

III. SUMMARY OF PLAINTIFF'S ALLEGATIONS IN THE TAC

On September 26, 2014, while incarcerated at the WCDF in Richmond, California, Plaintiff slipped and fell on a staircase. TAC, ¶¶ 3, 19, 22 (Doc. No. 28). Following the fall, Deputy D. Chilimodos attended to Plaintiff and reported that Plaintiff was complaining of pain, and Chilimodos observed that Plaintiff's left eye was swollen and there was blood on his cheek. TAC, ¶ 23. Deputy Chilimodos called a Code Two Medical Assistance. TAC, ¶ 24. In response, Lt. Bonthron, Sgt. Terrill, and medical staff (Eurydice, Dora, Karen) arrived. *Id.* An AMR ambulance was requested, and Plaintiff was transported to Contra Costa Regional Medical Center. TAC, ¶ 25. Deputy Chilimodos then investigated the cause of the fall and discovered some unknown liquid material on the stairs. TAC, ¶ 26.

At the Regional Medical Center, a CT of the facial bone and head was ordered, and Plaintiff was diagnosed with eye injuries. TAC, ¶ 27. Upon discharge from the Regional Medical Center, Medical Center staff noted some instructions if Plaintiff experienced certain symptoms. TAC, ¶ 3. WCDF medical staff did not communicate discharge instructions or medical requirements to custodial officers at the WCDF. *Id.* On September 29, 2014, while incarcerated, Plaintiff underwent eye surgery to repair a detached retina by Dr. Goldberg of the Bay Area Retina Associates. TAC, ¶ 29. Plaintiff received further medical treatment for the injuries sustained on September 26, 2014, through visits to the Regional Medical Center on September 30, 2014, November 6, 2014, December 23, 2014, and February 23, 2015. TAC, ¶ 28. As this Court correctly noted, "[n]otably, the last two visits occurred after Plaintiff was released from WCDF" on December 16, 2014. *See* ECF Doc. No. 24 at 2 n.4; TAC, ¶ 18.

Although the timing is unclear, Plaintiff alleges that, while recovering from the subject incident, he complained of swelling and pain to his face, cheek bone, and eye, and submitted

several requests for pain medicine which were denied on a number of occasions. TAC, ¶ 30. Between September 2014 and November 2014, Plaintiff filed 11 grievances for medical care that were ignored or never acted on. TAC, ¶ 53. At some unspecified date, Plaintiff was also denied a second surgery in San Pablo, California, because it was considered a "cosmetic surgery." TAC, ¶ 54. Plaintiff asserts four claims for relief under Section 1983, and two state law claims, against the individual defendants in their individual and official capacities. This Court already dismissed all of those claims with prejudice, against the County.

IV. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a motion to dismiss can be made and granted when the complaint fails "to state a claim upon which relief may be granted." Dismissal under Rule 12(b)(6) is appropriate where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990) (as amended), *abrogated on other grounds by Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562-63 (2007). When granting a motion to dismiss, a court is not required to grant leave to amend if amendment would be futile. *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990).

In order to survive a motion to dismiss, a plaintiff must allege facts that are enough to raise his right to relief "above the speculative level." *Twombly*, 550 U.S. at 555. All material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). A complaint must offer "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. "[C]ourts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Id.* (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). If a plaintiff's allegations do not bring his "claims across the line from conceivable to plausible, [his] complaint must be dismissed." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

V. LEGAL ARGUMENT

A. The First Claim For Relief Fails Because Plaintiff (1) Does Not Allege Any Personal Participation By Any Of The Named Defendants In The Alleged Eighth Amendment Violation, And (2) Fails To Sufficiently Plead A Deliberate Indifference Claim.

Section 1983 is not itself a source of substantive rights, but merely provides a vehicle for a plaintiff to bring federal statutory or constitutional challenges to actions by state and local officials. *Graham v. Connor*, 490 U.S. 386, 393-394 (1989); *Anderson v. Warner*, 451 F.3d 1063, 1067 (9th Cir. 2006). To state a claim under Section 1983, a plaintiff must allege that the defendant acted under color of state law and deprived plaintiff of a federal or constitutional right. *West v. Atkins*, 487 U.S. 42, 48 (1988). To state a claim against a defendant in his individual capacity, a plaintiff must allege specific facts linking the individual defendant to a constitutional violation personal to him. *Ortez v. Washington Cnty.*, 88 F.3d 804, 809 (9th Cir. 1996).

"Section 1983 creates a cause of action based on personal liability and predicated upon fault; thus, liability does not attach unless the individual defendant caused or participated in a constitutional deprivation." *Vance v. Peters*, 97 F.3d 987, 991 (7th Cir. 1996). Courts routinely grant motions to dismiss complaints that fail to allege personal participation by the named defendants. *See, e.g., Blantz v. Cal. Dep't of Corr. & Rehab.*, 727 F.3d 917, 927 (9th Cir. 2013) (dismissing "complaint [that] does not contain any specific factual allegations regarding [defendant's] involvement in the actions giving rise to this lawsuit"); *Anderson v. Tamalpais Cmty. Servs. Dist.*, 2009 U.S. Dist LEXIS 103692, at *10-11 (N.D. Cal. Sept. 30, 2009) (dismissing claims because the complaint "does not specify [defendant's] participation in plaintiff's claimed constitutional violations").

Here, Plaintiff's first claim for relief under Section 1983 is for deliberate indifference to serious medical needs, under the Eighth Amendment. He names as defendants Sheriff Livingston, Assistant Sheriff Schuler, Lt. Brooks, Nursing Director O'Mary, and Medical Director Goldstein. It is well established that a prison official's deliberate indifference to an inmate's serious medical needs constitutes cruel and unusual punishment in violation of the

Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976). However, not every prisoner claim of inadequate medical treatment states a violation of the Eighth Amendment. *Id.* at 105. To state a Section 1983 medical claim, a plaintiff must prove: (1) a "serious medical need" by demonstrating that the failure to treat the condition could result in further significant injury or the "unnecessary and wanton infliction of pain," and (2) that the defendant's response was "deliberately indifferent." *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006), *overruled on other grounds*; *Estelle*, 429 U.S. at 104-06.

To act with deliberate indifference, a prison official must both know of and disregard an excessive risk to inmate health; "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Deliberate indifference in the medical context may be shown by a purposeful act or failure to respond to a prisoner's pain or possible medical need, and harm caused by the indifference. *Jett*, 439 F.3d at 1096. Deliberate indifference may also be shown when a prison official intentionally denies, delays, or interferes with medical treatment or by the way prison doctors respond to the prisoner's medical needs. *Jett*, 439 F.3d at 1096; *Estelle*, 429 U.S. at 104-05.

Deliberate indifference is a higher standard than negligence or lack of ordinary due care for the prisoner's safety. *Farmer*, 511 U.S. at 835. Indeed, "[n]either negligence nor gross negligence will constitute deliberate indifference." *Clement v. Cal. Dep't of Corr.*, 220 F.Supp.2d 1098, 1105 (N.D. Cal. 2002) (citing *Farmer*, 511 U.S. at 835-36); *see also Broughton v. Cutter Labs.*, 622 F.2d 458, 460 (9th Cir. 1980) (mere claims of "indifference," "negligence," or "medical malpractice" do not support a claim under section 1983). "[A] mere 'difference of medical opinion . . . [is] insufficient, as a matter of law, to establish deliberate indifference.'" *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004). And a mere delay in medical care, without more, is insufficient to state a claim against prison officials for deliberate indifference. *See Shapley v. Nev. Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985). The indifference must be substantial and must rise to a level of "unnecessary and wanton infliction of pain." *Estelle*, 429 U.S. at 105-06; *Broughton*, 622 F.2d at 460.

Here, for example, Plaintiff alleges (1) that he was denied pain medication and a subsequent surgery, (2) that discharge instructions were ignored, and (3) that he did not receive medical care in a timely fashion. None of the above allegations, or any of the TAC's allegations, are directed towards the named defendants, Livingston, Schuler, Brooks, O'Mary or Goldstein. The TAC's allegations do not show any defendant's personal involvement in the alleged constitutional deprivations. Indeed, Plaintiff does not assert that any defendant was present or that any defendant took any specific actions relating to the "deliberately indifferent" medical care he alleges he received or did not receive while in the custody of the Sheriff's Office. Further, the TAC's conclusory allegations do not rise to the level of "deliberate indifference" or "unnecessary and wanton infliction of pain." Indeed, the TAC also alleges that Plaintiff received medical care, including a surgery, while incarcerated. Accordingly, the first claim for relief under Section 1983 for violation of the Eighth Amendment must be dismissed against all Defendants.

B. The Fourth Claim For Relief Fails Because Plaintiff Fails To State A Supervisory Claim Against Any Defendant In Their Individual Capacity.

Plaintiff's fourth claim for relief, brought under Section 1983, alleges supervisory liability against defendants Livingston, Schuler, Brooks, O'Mary, and Goldstein. Under Section 1983, "[a] supervisor may be liable [in his individual capacity] . . . only if there exists either: (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Jeffers v. Gomez*, 267 F.3d 895, 915 (9th Cir. 2001) (citations and quotations omitted). Accordingly, an individual capacity claim under Section 1983 is legally deficient unless it alleges a "causal connection" or "personal involvement" with respect to the supervisor. *Id.*; *Jones v. Williams*, 297 F.3d 930, 935 (9th Cir. 2002) (requiring allegations of "integral participation" in the alleged constitutional violation).

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1. Plaintiff fails to plead facts to show any defendant's personal involvement in the purported constitutional deprivations.

In *Ashcroft v. Iqbal, supra*, the Supreme Court specifically addressed supervisor liability in the context of Section 1983. 556 U.S. at 675-78. The Court noted that since "[g]overnment officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior* . . . a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Id.* at 676. Thus, the Court rejected the argument that "a supervisor's mere knowledge of his subordinate's" actions is sufficient to allege Section 1983 liability against a supervisor in his individual capacity. *Id.* at 677. Indeed, "the term 'supervisory liability' is a misnomer," because "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Id.* at 692-93.

Thus, Plaintiff must allege some facts indicating a supervisor's own participation in the alleged constitutional deprivation. *See Alston v. Cnty. of Sacramento*, 2012 U.S. Dist. LEXIS 95494, at *9-13 (E.D. Cal. July 10, 2012) (applying *Iqbal* pleading standards and granting defendants' motion to dismiss supervisory liability claim because plaintiff failed to allege any personal participation and thus no causal link between supervisors' conduct and the subordinates' actions); *Silva v. City of San Leandro*, 744 F. Supp. 2d 1036, 1050 (N.D. Cal. 2010) (dismissing civil rights claim for unlawful arrest and detention because defendant "was not involved in the . . . arrest or detention").

As shown above, Plaintiff fails to plead any facts to show any named defendants participated in the alleged constitutional deprivation.

2. Plaintiff fails to plead facts to show a plausible causal link between any defendant's alleged failure to supervise and the alleged constitutional violation.

Under the second prong of supervisor liability identified in *Jeffers*, a supervisor may also be liable under Section 1983 if a sufficient causal connection can be established between the supervisor's wrongful conduct and the constitutional violation. *Jeffers*, 267 F.3d at 915.

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In *Moss v. U.S. Secret Service*, the Ninth Circuit held that while plaintiff protestors pled sufficient facts alleging excessive force was used against them under the Fourth Amendment, they failed to establish the supervisors' roles in the use of excessive force. 711 F.3d 941, 968 (9th Cir. 2013), *overruled on other grounds by Wood v. Moss*, 134 S. Ct. 2056, 188 L. Ed. 2d 1039, 1049, 1055, n.3 (2014). In analyzing the protestors' complaint, the Ninth Circuit recognized that while a "supervisor [need not be] physically present when the injury occurred . . . plaintiffs nevertheless must allege *some* culpable action or inaction for which a supervisor may be held liable." *Id.* (citations and quotations omitted).

"In particular, [the protestors] do not allege that the supervisors directed or approved the tactics - the shoving, use of clubs, and shooting of pepper spray bullets - employed by the officers in moving the protestors." *Id.* Further, the plaintiffs failed to allege "facts . . . about the officers' training or supervision, nor do they specify in what way any such training was deficient." *Id.* Indeed, for a supervisor to be liable for a subordinate's [actions], the plaintiff must show that the supervisor "set in motion a series of acts by others, or knowingly refused to terminate a series of acts by others, which he knew or reasonably should have known, would cause others to inflict the constitutional injury." *Blankenhorn v. City of Orange*, 485 F.3d 463, 485 (9th Cir. 2007).

Here, Plaintiff alleges the following about Defendants' supervisory roles and "actions": (1) Sheriff Livingston, Lt. Brooks and Assistant Sheriff Schuler were responsible for training and supervision of Sheriff's Department and/or West County Detention Facility employees, including "Does I through X" or "Does I through XXX"; (2) Nurse Director O'Mary and Medical Director Goldstein were "personally responsible for promulgation of policies and procedures and allowance of the practices/customs pursuant to which the acts or omissions alleged herein were committed"; (3) Defendants and "DOES XXI through XXX tacitly encouraged, ratified and/or approved of the acts and/or omissions alleged herein, and knew that such conduct was unjustified and would result in violations of constitutional rights;" and (4) "[t]he customs, policies and/or practices of said Defendants were a direct and proximate cause of Plaintiff's injuries in that said Defendants failed to adequately train and supervise

their employees and/or agents to prevent the occurrence of the constitutional violations . . . Said Defendants also failed to promulgate appropriate policies or procedures or take other measures to prevent this incident." TAC, ¶¶ 7-11, 57, 76-77.

Aside from those conclusory allegations, Plaintiff fails to sufficiently plead any factual content establishing how any of the individual defendants, as "supervisors," took culpable action or inaction which resulted in Plaintiff's purported constitutional deprivations. There are no facts showing that any defendant (1) participated in any constitutional violation; (2) directed his or her subordinates to act in a way to violate the constitution; (3) had knowledge of any constitutional violation; or (4) implemented or approved or failed to promulgate any policy, custom or practice that caused the violation. This Court already found that the TAC fails to sufficiently show that any policies, customs or practices caused any alleged constitutional violation. *See* ECF Doc. No. 38.

Plaintiff's allegations that defendants "failed to train" or "supervise" their subordinates and thus "caused" Plaintiff's injuries are conclusory, and insufficient to state a plausible claim or raise his right to relief "above the speculative level." *See Goodfellow v. Ahren*, 2014 U.S. Dist. LEXIS 42397, at *25 (N.D. Cal. Mar. 26, 2014) (dismissing supervisory claim where there were no factual allegations showing the sheriff *caused* plaintiff's injuries); *Dougherty v. City of Covina*, 654 F.3d 892, 901 (9th Cir. 2011) (affirming dismissal of supervisory liability claim where plaintiff "pointed to no instances of deliberate indifference").

Accordingly, Plaintiff's Section 1983 supervisory liability claim against Defendants Livingston, Schuler, Brooks, O'Mary and Goldstein must be dismissed.

C. None of the Individually Named Defendants Are Liable in Their Official Capacity.

The TAC names David Livingston, Matthew Schuler, Craig Brooks, Elena O'Mary, and David Goldstein as defendants in their individual and official capacities. TAC, ¶¶ 7-11. "A suit against a governmental officer in his official capacity is equivalent to a suit against the governmental entity itself." *Larez v. City of L.A.*, 946 F.2d 630, 646 (9th Cir. 1991). "For this reason, when both an officer and the local government entity are named in a lawsuit and the

officer is named in official capacity only, the officer is a redundant defendant and may be dismissed." *Luke v. Abbott*, 954 F. Supp. 202, 203 (C.D. Cal. 1997) (citing *Vance v. Cnty. of Santa Clara*, 928 F. Supp. 993, 996 (N.D. Cal. 1996)). "Section 1983 claims against government officials in their official capacities are really suits against the governmental employer because the employer must pay any damages awarded." *Butler v. Elle*, 281 F.3d 1014, 1023 n.8 (9th Cir. 2002).

Here, the County of Contra Costa was a named defendant in the same TAC which is the subject of this motion. Thus none of the individual defendants can be named in an official capacity. "[I]t is no longer necessary or proper to name as a defendant a particular local government officer acting in official capacity." *Luke*, 954 F. Supp. at 204. "If both are named, it is proper upon request for the Court to dismiss the official-capacity officer, leaving the local government entity as the correct defendant." *Id.*; *Vance*, 928 F. Supp. at 996 ("[I]f individuals are being sued in their official capacity as municipal officials and the municipal entity itself is also being sued, then the claims against the individuals are duplicative and should be dismissed.").

This Court already dismissed the *Monell* claims against the County, with prejudice. The fact that the County was previously dismissed with prejudice does not mean the official capacity claims survive. Plaintiff repeats the identical claims against the individual defendants. The second, third, and fourth claims for relief in the TAC, being "*Monell*" claims based on policies, practices and customs, should be dismissed against the individual defendants as well, whether in their official or individual capacity, as this Court found those claims were deficient and not plausible.[3] *See* ECF Doc. No. 38.

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[3] It is not clear from the TAC whether the individual capacity claims are only as to the first claim (Eighth Amendment claim) and fourth claim (supervisory liability), or if Plaintiff is also asserting individual capacity claims as to the second and third claims for relief (unconstitutional policies and practices). Regardless, as shown above, all Section 1983 claims for relief in the TAC are deficient and should be dismissed.

D. Plaintiff's State Law Causes Of Action Are Barred By The Tort Claims Act Because They Diverge From The Government Tort Claim Filed By Plaintiff.

The state law claims in the TAC fail as a matter of law for the same reasons set forth in the County's motion to dismiss the SAC, and the Court's order granting same with prejudice. *See* ECF Doc. Nos. 14 & 24. Namely, Plaintiff's government tort claim did not allege any facts to support a medical negligence and/or failure to summon medical care cause of action. Therefore, just as Plaintiff failed to put the County on notice of any such claims, thereby barring Plaintiff's claims against the County, the individual defendants also could not have been put on notice of any such claims, and the claims must be barred against them as well. *See* Gov. Code, § 950.2. "It is well settled that a government claim must be filed with the public entity before a tort action is brought against the public entity or public employee." *Watson v. State of Cal.*, 21 Cal. App. 4th 836, 843 (1993) (citing Gov. Code, § 950.2). Thus, a complaint should attach the government tort claim or plead details of the claim, i.e., which employees were alleged in the claim to have allegedly caused the injuries and why the public entity and each employee is liable. *Wheat v. Cnty. of Alameda*, 2012 U.S. Dist. LEXIS 38472, at *21 (N.D. Cal. Mar. 21, 2012).

Government Code section 910 governs the specific requirements for a tort claim. Among other things, Section 910 requires that a claim state: (1) the date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted; (2) a general description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of presentation of the claim; and (3) the name of the public employee who caused the injury, if known.

Compliance with the Tort Claims Act includes that the subsequently filed complaint conform to the presented claim. *Stockett v. Assoc. of Cal. Water Agencies Joint Powers Authority*, 34 Cal. 4th 441, 447 (2004). As noted by the California Supreme Court in *Stockett*, "section 945.4 requires *each cause of action* to be presented by a claim complying with section 910." *Id.* (emphasis added). In other words, "[i]f a plaintiff relies on more than one theory of recovery against the [governmental agency] . . . the complaint is vulnerable to [dismissal] if it

alleges a factual basis for recovery which is not fairly reflected in the written claim." *Fall River Joint Unified Sch. Dist. v. Superior Court*, 206 Cal. App. 3d 431, 434 (1988) (citations and quotations omitted). That is because the purpose of the claim is to present sufficient detail "to reasonably enable the public entity to make an adequate investigation of the merits of the claim and to settle it without the expense of a lawsuit." *Blair v. Superior Court*, 218 Cal. App. 3d 221, 225 (1990) (citations and quotations omitted).

In *Fall River*, a student was injured when entering a campus building through a steel door that closed hard enough to cause injury. *Fall River, supra*, 206 Cal. App. 3d at 434. Plaintiff filed his original complaint after his claim was rejected, setting forth two causes of action: dangerous condition of public property and negligence. *Id.* Eight months later, plaintiff filed an amended complaint adding a third cause of action for negligent failure to supervise students. *Id.* The Court held the divergence between the claim and the amended complaint was too great – that the complaint alleged liability on an entirely different factual basis than what was set forth in the tort claim. *Id.* at 435-36; *see also Nelson v. State of California*, 139 Cal. App. 3d 72, 79-81 (1982) (dismissal of amended complaint sustained on appeal; facts alleged in prisoner's tort claim for medical malpractice did not correspond to facts alleged in amended complaint for negligent failure to summon medical care).[4]

Here, the government tort claim filed by Plaintiff included "claims" for breach of fiduciary duty; failure to provide a "safe environment that would not cause injury to the claimant"; negligence by creating an environment of risk of harm to the claimant by not having adequate policies for deputies to supervise workers cleaning the module; and negligence in providing inadequate slippers which "are dangerous to wear." *See* ECF Doc. No. 16-1 at 4 (Exh. A to Boyd Decl. in support of RJN, filed on January 22, 2016). In the tort claim,

[4] Another line of cases hold that a variance between the facts stated in the tort claim and those alleged in the complaint is not fatal where the "apparent differences between the complaint and the claim were merely the result of plaintiff's addition of factual details or additional causes of action," or where the complaint does not constitute a "complete shift in allegations." *Stevenson v. S.F. Housing Authority*, 24 Cal. App. 4th 269, 277 (1994). As shown herein, however, and as this Court already found, Plaintiff's tort claim is not sufficiently related to the claims in the TAC.

Plaintiff also simply described the "type of claim" as "personal injury - slip [and] fall - stairs." *Id.* at pg. 3.

Plaintiff's TAC (and the SAC before it), however, focuses on alleged events that took place after the accident, namely, failure to summon medical care and negligent medical care. A violation of Government Code section 845.6 for failure to summon medical care, and a claim for medical malpractice, are two distinct causes of action. *See Castaneda v. Dep't of Corr. & Rehab.*, 212 Cal. App. 4th 1051, 1061 (2013) (citations omitted). This Court noted in its order granting the County's motion to dismiss the SAC that:

> Plaintiff's tort claim does not allege any events following the fall, nor does it name any of the WCDF medical staff. . . . Plaintiff's SAC does not merely provide a fuller exposition of the factual basis in the tort claim, but rather is based on an entirely different set of facts, concerning a different set of actors and setting forth different, unrelated causes of action. A tort claim that is entirely focused on adequacy of footwear and maintenance of property to prevent slip-and-fall accidents could not conceivably put a defendant on notice that a plaintiff would sue for the failure to provide medication and/or surgery. This is especially true where, as here, the alleged failure to furnish medical care and medical malpractice claims are based on acts or omissions that occurred days – if not weeks – after the accident occurred, and were not alleged anywhere in the tort claim.

ECF Doc. No. 24 at 5:21-22, 6:14-22 (citations and quotations omitted).

The fifth and sixth causes of action in the TAC are therefore both barred under California law and should be dismissed with prejudice.[5]

E. Even If Plaintiff's State Law Causes Of Action Were Not Barred By The Tort Claims Act, They Each Fail To State Facts Sufficient To State A Claim For Relief.

Plaintiff brings the fifth cause of action for "failure to furnish/summon medical care," under California Government Code section 845.6. Section 845.6 provides that:

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[5] The state law claims may also be barred because they were not brought within six months of the rejection of Plaintiff's government tort claim, as required under the Tort Claims Act. *See* Gov. Code, § 945.6(a)(1). Plaintiff's accident occurred on September 26, 2014, he filed a tort claim on or about September 29, 2014, and the claim was rejected and notice sent on November 4, 2014. Plaintiff filed the original complaint on May 5, 2015, and the FAC on September 10, 2015. Plaintiff filed the SAC on January 9, 2016, alleging medical malpractice and failure to summon medical care for the first time.

> Neither a public entity nor a public employee is liable for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner in his custody; but, except as otherwise provided by Sections 855.8 and 856, a public employee, and the public entity where the employee is acting within the scope of his employment, is liable if the employee knows or has reason to know that the prisoner is in need of immediate medical care and he fails to take reasonable action to summon such medical care.

Gov. Code, § 845.6; *see also Castaneda, supra*, 212 Cal. App. 4th at 1070.

"California courts have narrowly interpreted section 845.6 to create limited liability []." *Frary v. Cnty. of Marin*, 81 F.Supp.3d 811, 842 (N.D. Cal. 2015) (citing *Castaneda*). "Liability under section 845.6 is limited to serious and obvious medical conditions requiring immediate care," and requires "*actual or constructive knowledge* that the prisoner is in need of *immediate* medical care." *Frary*, 81 F.Supp.3d at 842; *see also Jett, supra*, 439 F.3d at 1099 (citations omitted).

Here, the TAC alleges that medical care was indeed summoned by jail officials immediately after Plaintiff's injury on September 26, 2014, and medical care was also immediately provided, as well as over a period of time. There are no facts alleged to show that after the initial injury, when care was summoned, any subsequent medical need was either "immediate," or that any *defendant* had "actual or constructive knowledge" that Plaintiff was in need of immediate medical care. Thus, under the facts alleged, the individual defendants, as County employees, are immune from liability under Government Code section 845.6, and the fifth cause of action fails as a matter of law. "Section 845.6 provides both public entities and employees immunity where they fail to furnish or obtain medical care for a prisoner, other than when the prisoner is in need of immediate medical care." *Sims v. Lopez*, 2012 U.S. Dist. LEXIS 14896, at *9 (E.D. Cal. Feb. 7, 2012) (citations and quotations omitted); *see also Horn v. State of Cal.*, 2005 U.S. Dist. LEXIS 28265, at *8-9 (E.D. Cal. Nov. 16, 2005) (granting motion to dismiss section 845.6 claim where there were no facts pled that defendants were aware of need for immediate medical care).

The sixth cause of action for medical malpractice fails because (1) medical malpractice claims under California law must be brought within one year after the plaintiff discovers the injury (*see* Civ. Proc. Code, § 340.5); and (2) Plaintiff does not allege that he met the

requirements of California Code of Civil Procedure section 364, which states that "[n]o action based upon the health care provider's professional negligence may be commenced unless the defendant has been given at least 90 days' prior notice of the intention to commence the action." Civ. Proc. Code, § 364(a). The notice must notify the defendant of the legal basis of the claim, including with specificity the nature of the injuries suffered. Civ. Proc. Code, § 364(b). As noted above, Plaintiff's government tort claim fails to provide any notice of a medical malpractice claim, and Plaintiff does not allege that he provided any other notice.

F. Further Leave To Amend Should Not Be Granted.

Plaintiff has now had three attempts to amend the complaint to state a plausible claim against the County defendants. Plaintiff named the individual defendants for the first time in his SAC, filed on January 9, 2016. Plaintiff never served the individual defendants with the SAC. After the Court granted the County's motion to dismiss the SAC, Plaintiff filed the operative TAC on March 31, 2016. Summons was not issued as to the individual defendants until August 10, 2016. Plaintiff did not "serve" the individual defendants with a summons and the TAC until August 26, 2016, when defense counsel received waiver of service of summons forms, with the TAC and summons. This was more than two months after the Court had granted the County's motion to dismiss the TAC, with prejudice, and ordered that Plaintiff serve the TAC on the remaining defendants "forthwith." *See* ECF Doc. No. 38 at 8:21-22.

If Plaintiff had been more diligent in serving all defendants, the defendants, including the County, could have filed one collective motion to dismiss the SAC and TAC, the Court could have issued one order on said motions, and Plaintiff could have amended all claims as to all defendants at that time. Instead, we are now dealing with the individual defendants' first motion to dismiss. Plaintiff has had sufficient opportunities to amend and cure the complaint's fatal deficiencies. As this is Plaintiff's fourth attempt to state a plausible claim, and he has delayed in serving the individual defendants and moving this case forward, the TAC should be dismissed without further leave to amend. *See Guevara v. Marriott Hotel Servs.*, 2013 U.S. Dist LEXIS 38847, at *28-29 (N.D. Cal. Mar. 20, 2013) (denying leave to amend due to delays and adequate opportunity for prior amendments).

VI. CONCLUSION

Plaintiff has now made four attempts to state a plausible claim against the Contra Costa County defendants. Plaintiff has had adequate opportunity to state sufficient facts to state a claim against the County defendants, and it is clear Plaintiff will not be able to do so. The TAC and all claims for relief must be dismissed with prejudice, and without further leave to amend.

DATED: October 25, 2016

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